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# **Compliance Bargaining in the European Union**

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## Introduction

Are bargaining and compliance two separate phenomena or do negotiations follow as well as precede formal agreements? In a previous article, we argued that “compliance bargaining” is a common, yet neglected, phenomenon in world politics, and developed an analytical framework for understanding its forms, sources, and effects in international cooperation (Jönsson and Tallberg 1998).<sup>1</sup> In this follow-up paper, we conduct an in-depth analysis of compliance bargaining in the EU, informed by this general analytical framework.

Mirroring the theoretical divorce in International Relations scholarship, bargaining and compliance remain the objects of separate strands of research in EU studies. The literature on bargaining and negotiations in the EU is heavily focused on the intergovernmental bargaining preceding history-making deals in European cooperation (e.g., Garrett 1992; Patterson 1997; Moravcsik 1998; Hosli 2000), the interinstitutional negotiations leading up to the adoption of secondary legislation (e.g., Tsebelis 1994; Tsebelis and Garrett 1997; Earnshaw and Judge 1997), and the EU as a negotiating party in external relations (e.g., Woolcock and Hodges 1996; Friis 1996; Meunier 2000). In all cases, the bargaining processes explored by existing scholarship are pre-decisional, that is, they consist of the exchange of proposals for purposes of

<sup>1</sup> We understand compliance bargaining as “a process of bargaining between the signatories to an agreement already concluded, or between the signatories and the international institution governing the agreement, which pertains to the terms and obligations of this agreement” (Jönsson and Tallberg 1998: 372). Compliance bargaining is a subset of the more general phenomenon of post-agreement bargaining, which refers to all those bargaining processes which follow from the conclusion of an agreement.

reaching agreement on new rules. By contrast, post-decisional processes of bargaining over compliance with these rules have so far been neglected in the literature. The pre-decisional bias in existing research is well illustrated by two recent special issues on negotiation and bargaining in the EU, which exclusively feature articles on the processes preceding new deals (*International Negotiation* 1998; *Journal of European Public Policy* 2000).

The literature on compliance and enforcement in the EU may similarly be divided into three branches: public policy research on the implementation of EU policy (e.g., Siedentopf and Ziller 1988; Peters 1997; Knill and Lenschow 1998; Börzel 2000a), legal and political research on the European Commission's execution of its function as "guardian of the treaties" (e.g., Audretsch 1986; Dashwood and White 1989; Mendrinou 1996; Tallberg 1999), and legal and political research on the interaction between the European Court of Justice (ECJ) and national courts in the decentralized enforcement of EC law (e.g., Burley and Mattli 1993; Alter 1996; Slaughter, Stone Sweet, and Weiler 1998; Stone Sweet and Brunell 1998). In all three branches of research, compliance tends to be conceptualized slightly differently, but in neither are processes of bargaining at the center of this understanding, though parts of both the public policy literature and the literature on Commission enforcement are sensitive to the negotiations involved in securing rule conformance.

In this paper, we isolate the primary characteristics of compliance bargaining as it takes place in the EU – the structure of bargaining, the distribution of bargaining power, and the effects of bargaining on compliance, rule interpretation, and the allocation of gains. We advance two principal arguments. First, the dynamics of compliance bargaining differ in distinct ways from pre-decisional negotiations over new EU rules. Most notably, compliance bargaining is a bilateral process between the Commission and non-complying member states, rather than a multilateral process of

intergovernmental and interinstitutional negotiations, and it takes place in the shadow of the law, rather than in the shadow of the vote. To incorporate compliance bargaining in our conception of EU policy-making therefore requires more than just extrapolating pre-decisional patterns of negotiation into the post-decisional phase. Second, the institutional structure of the EU provides for a form of compliance bargaining which has proven particularly effective as a way of addressing state violations. The Commission's position as third-party prosecutor within the formal framework of the treaty's infringement and sanctioning procedures produces a strategic context in which non-complying states generally find themselves at a bargaining disadvantage. While pervasive, rule violations also tend to be a temporal phenomenon in the EU, not least because of institutionally-defined processes of compliance bargaining. By contrast, the institutional structures in the WTO and NAFTA produce forms of bargaining which differ from those in the EU and which, according to a preliminary assessment, are less effective in addressing compliance problems.

The paper is divided into three substantive sections. In the next section, we present a condensed version of the framework for analyzing compliance bargaining introduced in our previous work. The body of the paper consists of the empirical section on compliance bargaining in the EU. In this section, the structure of bargaining, the distribution of bargaining power, and the effects of bargaining in the post-decisional phase are contrasted with the well-known characteristics of pre-decisional negotiations. We conclude by placing the observations about EU compliance bargaining in a broader comparative perspective.

## Compliance Bargaining in International Relations

Why does international compliance bargaining occur? What forms may it take? And what are the effects of compliance bargaining? Let us briefly address these basic questions (cf. Jönsson and Tallberg 1998: 378-87).

*Origin.* Compliance bargaining typically stems from the ambiguity of most international agreements. Ambiguous formulations may stem from the fact that these are necessary in order for the parties to reach a minimum level of consensus and come to an agreement at all (Lebow 1996). Broad and general language may also offer a “veil of uncertainty,” which permits a number of parallel interpretations and visions as to the future development of a cooperative endeavor (Young and Osherenko 1993). Also related to the future, imprecision and ambiguity can serve the function of insurance policy or escape clause, when gains and costs from an agreement are unpredictable (Lebow 1996). Yet another reason may be the inability of drafters to foresee all possible applications and to plan for all contingencies, with an ensuing mismatch between the coverage and formulations of the treaty and the practice it seeks to regulate (Chayes and Chayes 1995). In sum, the consequence of treaty ambiguity is that, “more often than not, there will be a considerable range within which parties may reasonably adopt differing positions as to the meaning of the relevant treaty language” (Chayes and Chayes 1995: 11). Diverging interpretations of treaty language provide a fertile ground for bargaining regarding what actions do and do not constitute compliance.

*Forms.* One basic distinction can be made between *self-help* and *third-party* compliance bargaining. These two forms constitute ideal types, and concrete conflicts and bargaining situations may exhibit features of both or may oscillate between the two. Self-help bargaining refers to bargaining between the parties to the treaty, now taking

place in the post-agreement phase. Lack of a common authority to enforce rules is the defining characteristic of the setting within which self-help bargaining occurs. Third-party bargaining has as its defining and unique characteristic the existence of an international institution which interacts with the signatories of an agreement in the interpretation of compliance and the settling of disputes.

Third-party bargaining, in turn, may be of two kinds, depending on whether the international institution acts as “judge” or “prosecutor.” The traditional conception of international institutions as third parties is that of a judge. Member states in conflict over treaty compliance and interpretations bring the case before a dispute-settlement body. Bargaining, in this context, takes place between the disputing states within the framework of the dispute-settlement process. International institutions as judges are a common form of third-party enforcement in international trade. GATT/WTO as well as NAFTA dispute-settlement mechanisms are cases in point.

An alternative conception of international institutions as third parties is that of a prosecutor. Institutions as prosecutors do not issue interpretations as much as they act independently and strike down on member states suspected of violating the treaty. Bargaining, in this context, primarily takes place between the international enforcement institution and the signatory suspected of non-compliance. Institutions as prosecutors are a less common form of third-party enforcement, with the prime examples being the European Commission of the EU and the International Atomic Energy Agency (IAEA), which both have enforcement powers that can be used against member states in breach of EC law and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, respectively.

Under third-party enforcement generally, bargaining results from the combination of a “sanctioning ladder” and the interest of all parties to settle disputes at an early stage, rather than letting cases or conflicts run their full course.

The term sanctioning ladder is used to denote the consecutive steps, which may be taken to induce compliance, and which typically are characterized by a progressive increase of pressure and costs of non-compliance.

*Effects.* Why does compliance bargaining matter and why do we need to pay attention to it as an empirical phenomenon? Compliance bargaining may alter outcomes and affects future rounds of bargaining in three principal ways: (1) by influencing the level of compliance, (2) by defining what constitutes compliance and non-compliance, and (3) by affecting the distribution of gains in future bargaining.

First, and most fundamentally, compliance bargaining influences the level of compliance. In the search for mutually acceptable solutions, it might put an end to actions perceived to be in breach by one of the parties. From the perspective of the guardians, compliance bargaining serves to induce and persuade violators to step into line, to the extent that it raises the cost of non-compliance. From the perspective of the violators, compliance bargaining serves to test the limits of the other parties' tolerance of deviant behavior.

The second effect of compliance bargaining is to provide definitions of what constitutes compliance and what actions are or are not in line with a treaty. Compliance as defined in post-agreement bargaining may not correspond to compliance as perceived by the parties when entering into the agreement. In other words, states settle for agreements and negotiation outcomes whose terms and distribution of gains they believe they understand and foresee, but which often are substantially altered when compliance is ultimately defined through post-agreement bargaining.

The third essential effect of compliance bargaining is its influence on how gains are distributed in future rounds of bargaining. In a context where states interact on a regular basis, other states are more likely to enter into future agreements with a state, and on more favorable terms, if it carries a reputation for



keeping commitments. Therefore, a good reputation is crucial to the realization of future benefits from cooperation (Kreps and Wilson 1982; Keohane 1984; Chayes and Chayes 1995). Compliance bargaining reinforces and contributes to the distribution of positive and negative reputational effects, a distribution which ultimately rests on how well states comply. Consequently, compliance bargaining does not only alter the distribution of gains in agreements already entered into, but also in those to come.

## **Compliance Bargaining in the EU**

While largely neglected by existing literature on negotiations and compliance in the EU, processes of bargaining constitute the predominant mode of settling disputes over compliance in the EU. The characteristics of compliance bargaining are significantly different from the characteristics of pre-decisional negotiations over new legislation and treaty rules. In this section, we isolate the structure of EU compliance negotiations, the sources of bargaining power for the major actors involved, and the effects of these processes on compliance with EC law. We demonstrate how the structure of bilateral interaction between the Commission as prosecutor and member governments as defendants produces distinct supranational bargaining advantages, which are instrumental to the EU's demonstrated effectiveness in ending violations.

*Structure: From Multilateral Intergovernmental and Interinstitutional Bargaining to Bilateral Supranational Bargaining*

With the shift from pre-decisional negotiations over new rules to post-decisional bargaining over compliance, the structure of interaction in the EU policy process is fundamentally transformed. Multilateral intergovernmental and interinstitutional negotiations in EU decision-making are replaced by bilateral supranational bargaining in EU enforcement. Despite the existence of institutional procedures for interstate enforcement and bargaining, negotiations over compliance almost exclusively take place between the Commission, acting as third-party prosecutor, and national governments, representing states suspected of non-compliance.

In stylized terms, pre-decisional politics in the EU is characterized by two interlocking bargaining processes: intergovernmental negotiations between state representatives in the Council and interinstitutional negotiations between the Commission, the European Parliament, and the Council. It is the nesting of these two games that leads one observer to characterize EU decision-making as a “multilateral inter-bureaucratic negotiation marathon” (Kohler-Koch 1996: 367). Less stylized accounts of pre-decisional politics typically stress the multi-level character of EU negotiations (e.g., Kohler-Koch 1996; Grande 1996), the involvement of non-governmental actors (e.g, Falkner 2000), and the existence of informal negotiation networks (e.g., Peterson 1995; Jönsson et al. 1998). As Ole Elgström and Michael Smith note in the introduction to a recent special issue on negotiations in the EU: “In the ‘internal’ negotiation of EU business, there is a wide range of institutional, governmental, non-governmental and quasi-governmental participants; when the ‘external’ implications of negotiation are added to the mix, there is a heterogeneous and

at times almost bewildering array of actors in negotiation” (Elgström and Smith 2000: 675).

Post-decisional negotiations over compliance, by contrast, feature a structure of interaction that is essentially bilateral, with the supranational Commission and the offending member state as the two exclusive parties. In the words of H. A. H. Audretsch, “[compliance in the EU] is generally achieved in an amicable way through negotiations between the supervising body and the state concerned” (Audretsch 1986: 410). Expressed in generic terms, compliance bargaining in the EU is essentially third-party and prosecutor-based, with the Commission pursuing cases against non-complying member states in a hierarchical judicial system, where the ECJ has the ultimate power to adjudicate disputes and interpret existing rules.

The structure of compliance bargaining in the EU is the product of both institutional design and state preference. As noted in the previous section, the specific character of compliance bargaining in a given institutional setting tends to be shaped by existing dispute-settlement mechanisms. In the EU, the founding treaties provide for two alternative avenues for settling disputes over compliance. On the one hand, governments may engage each other directly under Article 227 (ex Art. 170), which offers a procedure by which one member state may sue another for non-compliance and have the case decided by the ECJ. On the other hand, governments may leave the task of ensuring compliance to the Commission – the “guardian of the treaties” – which enjoys the authority under Article 226 (ex. Art. 169) to initiate infringement proceedings against non-complying member states, and ultimately refer these cases to the ECJ.

Whereas the design of dispute settlement procedures thus provides for both interstate and supranational enforcement, the historical record demonstrates an overwhelming preference on the part of national governments to let the Commission carry the burden, rather than continuing the state-to-state bargaining of the pre-

decisional phase. Less than a handful of cases have been initiated by member governments under Article 227. By contrast, the Commission has initiated more than 16,000 cases between 1958 and 2000 (Krislov, Ehlermann, and Weiler 1986; European Commission annual monitoring reports).

The literature on EU enforcement points to a set of advantages of the supranational infringement procedure compared to the interstate version, making the former a more attractive alternative to member governments (e.g., Pescatore 1974; Audretsch 1986; Dashwood and White 1989; Weatherill and Beaumont 1995). First, enforcement through the Commission saves the member states the costs of litigation. Second, the supranational procedure reduces the risk of spirals of retaliation, since, under the interstate procedure, “a snowball effect might be the consequence of a complaint; where one State starts, another follows!” (Audretsch 1986: 237). Third, the Article 226 procedure satisfies the preference for diplomatic courtesy among the member states. And fourth, the supranational procedure provides a process of enforcement that is easier for member governments to accept, since the proceedings are initiated by “an institution representative of the whole, and hence objective both by its status and its task” (Pescatore 1974: 82).

For these reasons, compliance bargaining in the EU almost exclusively takes place within the framework of the supranational infringement procedure. The seemingly formal and inflexible framework of the procedure provides ample room for bargaining and compromises between the Commission and the member states. At the heart of the procedure are four consecutive stages where conflicts may be resolved. In the first, informal phase, the Commission notifies the member state in question of its alleged act of non-compliance and the state is given the opportunity to respond. If the matter is not settled in the first, informal phase, the procedure continues by way of formal means. In the second phase, the Commission formally initiates an infringement proceeding by

sending a “letter of formal notice” to the member state, whereby the Commission informs the state of its grounds for complaint and invites it to submit its views. The third phase consists of the Commission giving a “reasoned opinion.” Whereas the formal notice described the subject-matter of the violation, the reasoned opinion presents the Commission’s legal arguments. If the member state fails to comply with the reasoned opinion and continues its action in breach of EC law, the case enters into the procedure’s fourth and final stage of referral to the ECJ. To the extent that a government persists in its violations even after an ECJ decision, the Commission may restart the entire process by initiating a new and identically-structured proceeding through the Article 228 (ex Art. 171) sanctioning procedure.

Formal and informal bargaining aimed at finding mutually acceptable solutions takes place at all stages of the infringement procedure. Bargaining is most intense in the early stages of the procedure, however, and close to non-existing once a case has been referred to the ECJ. These processes of bargaining over compliance within the formal framework of the infringement procedure point to the complementarity of negotiation and adjudication as means for settling disputes. Notes Francis Snyder: “We usually think of negotiation and adjudication as alternative forms of dispute settlement. It may be suggested, however, that in the daily practice and working ideology of the Commission, the two are not alternatives but instead are complementary. The main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process” (Snyder 1993: 30).

Compliance bargaining within the supranational infringement procedure consists of bargaining in a wide sense, and involves both direct and indirect verbal and behavioral communication. In letters and face-to-face meetings, the Commission attempts to persuade member states to comply by explaining their violations under EC

law, by communicating the threat that the Commission may bring the case to the next step in the procedure, and by reminding states that economic sanctions may be imposed on them if they fail to comply with ECJ judgments. Moreover, the Commission attempts to raise the cost of non-compliance by mobilizing social and political pressure, thus exploiting states' concern with reputational repercussions. To this end, the Commission presents official reports on rule violations, publicly announces its initiation of infringement proceedings through press releases, and reports non-compliance patterns at Council meetings. Member states, for their part, attempt to explain to the Commission the political, economic, social, or administrative reasons and rationales behind the measures under review. Member states may also present alternative interpretations of the problem at hand, suggest compromise solutions, or signal the unilateral decision not to budge and let the case run its course.

Since the late 1980s, compliance bargaining in this wider sense has been supplemented with direct and institutionalized negotiations – so called “package meetings” – in matters pertaining to internal market and environmental regulation. The Commission (1993: 13) describes package meetings as “an instrument of partnership between the Commission and the Member States which is designed to arrive at non-contentious solutions to existing litigation concerning national compliance with Community law.” Package meetings are conducted with one member state at a time and consist of exchanges on all cases currently under review by the Commission, whether at the informal or the formal stage of the infringement procedure. During the 1990s, the Commission conducted package meetings with each member state about every second year. The term “package meeting” is to some extent misleading, since these negotiation sessions in fact consist of a series of meetings. Each series typically includes a preparatory meeting, a package meeting, a follow-up meeting, and a concluding stock-taking meeting. All meetings are preceded as well as followed by communication

between the parties, and the entire process is generally described as one of “dialogue” (European Commission 1994; interview, Swedish government official, Dec. 6 1996).

Like all forms of bargaining, compliance bargaining between the Commission and member governments consists of both cooperative and conflictual elements. Both parties share a preference for amicable solutions, yet they disagree as to whether or not the member state is in breach of EC law.

On the conflictual side, the parties obviously disagree about the conformance of state actions with existing EU rules. Member states generally maintain that their actions are justifiable and in line with existing legal provisions. National governments typically consider the Commission’s arguments to be based on flawed legal assumptions and interpretations, or complain that the Commission fails to comprehend the constraints of domestic political processes and capacity limitations. The Commission, for its part, bases the initiation of infringement proceedings on the fundamental notion that member states are in breach of EC law. In its role as guardian of the treaties, it is the obligation of the Commission to fight such non-compliance by way of the legal and political means at its disposal.

Simultaneously, however, both parties share a preference for amicable solutions, and neither member governments nor the Commission desire infringement proceedings. As one Commission official put it, “legal proceedings are not good for anyone” (interview, Sept. 24 1996). From the perspective of member governments, infringement proceedings in general, and ECJ judgments in favor of the Commission in particular, are highly uncomfortable and tarnish the states’ reputations as cooperative partners. “The ultimate fate of having their failure to fulfil an obligation under the EEC Treaty formally established by the European Court is one the Member States are evidently anxious to avoid” (Dashwood and White 1989: 411). As a result, “Member States endeavour, by means of a variety of objections, as far as possible to avoid Judgments being given

against them in proceedings for failure to fulfil a Treaty obligation” (Everling 1984: 221).

The Commission’s desire to close infringement proceedings and put an end to violations by way of amicable solutions, stems from its dual role in European integration and its limited resources. The Commission’s other role as policy initiator and prime promoter of European integration entails that the institution must seek to ensure the continued cooperation of member states for integration to proceed. As a consequence, “[p]olitical considerations might induce the Commission to make concessions to national interests and pressure of the States. The Commission knows after all that the progress of integration depends to a high degree upon the willingness and the co-operation of the States. It is extremely important for the Commission to ensure this co-operation permanently” (Audretsch 1986: 420). Equally important, however, the Commission is subject to considerable resource constraints. With limited staff and an ever increasing workload, the option of informal and amicable solutions is very attractive in comparison to the resource-intensive alternative of continued infringement proceedings (European Commission 1989; interview, Commission official, Sept. 24 1996).

Summing up, the structure of bargaining in post-decisional enforcement is one of bilateral negotiations between the supranational Commission and member states suspected of non-compliance. Both share a preference for amicable solutions, and the Art. 226 infringement procedure offers a formal framework for bargaining to this end.



*Power: From Bargaining in the Shadow of the Vote to Bargaining in the Shadow of the Law*

The shift from pre-decisional negotiations to post-decisional compliance bargaining fundamentally alters the power relations between the major actors in the EU policy process. Traditional determinants of bargaining power, such as voting strength, preference intensity, decision rules, and legislative procedures, are replaced by sources related to the parties' relative control over the interpretation of EC law, command of the legal procedures, and capacity to shape cooperative outcomes. In post-decisional compliance bargaining, the Commission has the upper hand, whereas member governments generally – irrespective of the power positions they occupy in EU decision-making – find themselves at a disadvantage.

In the negotiation of new EU rules, the relative bargaining power of the parties is typically shaped by the institutional provisions governing the adoption of these rules. The Commission and the Parliament enjoy relatively stronger bargaining positions in relation to the Council in the adoption of secondary legislation than in the chiseling out of new treaty rules. Likewise, the institutions hold a stronger hand in some legislative procedures than in others, best exemplified by the Parliament's pronounced role in the co-decision procedure, as opposed to the consultation and cooperation procedures. The relative bargaining power within the Council, between the member states, is similarly shaped by the rules of adoption. In the restricted number of cases where new rules must be adopted by unanimity, "the pattern of preference intensity or 'asymmetric interdependence' dictates the relative value each state places on an agreement, which in

turn dictates its respective willingness to make concessions” (Moravcsik 1998: 60). However, in the large majority of cases, where rules are adopted through qualified majority voting, the bargaining positions of the individual states are intimately connected to their relative voting power, placing large states at an advantage. Depending on the applicable decision rules, Council bargaining takes place either “in the shadow of the veto” or “in the shadow of the vote.”

In post-decisional compliance bargaining, by contrast, the most distinct source of variation in bargaining power is the parties’ relative control over the interpretation of EC law. Expressed in other terms, the compliance game is played “in the shadow of the law,” far removed from the vetos and votes of EU decision-making. With a monopoly on the interpretation of EC law, the Commission and the ECJ enjoy extremely favorable positions in relation to EU governments, whose bargaining moves typically are designed to probe the limits of acceptable behavior, given their inability to overthrow supranational legal interpretations.

The Commission’s bargaining power is vested in its unilateral control over the infringement procedure and its discretion in decisions about initiation, intensification, and closure of cases. Ostensibly, the infringement procedure is a strictly judicial process in which the Commission initiates and pursues infringement proceedings against member states which have committed clear and objectively identifiable violations of EC law. Beneath the surface of neutral and objective law, however, Article 226 proceedings are highly political and subject to substantial discretion on the part of the Commission. The Commission exercises its supervisory function “not only from a purely technical, but also from a political point of view—not incidentally, but permanently” (Audretsch 1986: 408).

The discretion is particularly notable with regard to three essential aspects of the infringement procedure: the decision of whether to initiate infringement proceedings or

not, the decision of what time limits governments must comply within before the Commission moves the case to the next step in the procedure, and the decision of when and how infringement proceedings are closed (Evans 1979; Audretsch 1986; Dashwood and White 1989). In other words, it is the Commission alone that decides about the initiation, intensification, and closure of suits against non-complying states. Member governments' lack of means for monitoring the Commission in its enforcement function further enhances the institution's autonomy, by making it difficult for other parties to judge whether the Commission acts in accordance with its formal enforcement obligations (Tallberg 1999).

In fact, the Commission's discretion constitutes a requirement for compliance bargaining as such. In essence, it allows the Commission room for maneuver within the confines of its formally delegated role. The Commission is thereby in a position where it may arrive at "compromise solutions in a flexible way through negotiations, conciliatory measures, and mutual concessions" (Audretsch 1986: 449). Expressed differently, had the discretion of the Commission been very limited, or even non-existing, there would have been little scope for bargaining, since the institution would have had little to offer member states in return for conciliatory moves. Bargaining, by definition, requires a zone of acceptance within which both parties may consider compromise solutions, if there is to be any agreement at all.

The bargaining power related to the Commission's unilateral control over the legal procedures is further reinforced by the institution's strategic exploitation of member governments' desire to avoid reputational and financial costs. Rather than avoiding steps which can throw negative light on member states, the Commission has made it its strategy to embarrass laggards into action through means of shaming (Tallberg 1999). For purposes of gradually increasing member states' discomfort and raising the reputational cost of non-compliance, these efforts are reinforced with each

step in the infringement procedure. “When the State appears to persist in the violation, an attempt will be made to raise the cost of violation or to lower its profit. The threat of political and social pressure tends to raise the cost” (Audretsch 1986: 410-1).

Whereas, previously, the EU’s supranational institutions lacked the power to impose actual financial sanctions on non-complying states, the Commission and the ECJ can now use the threat of such economic countermeasures in their attempts to persuade member governments to comply. Since the entry into force of the Maastricht Treaty in November 1993, the Commission and the ECJ may, under the revised Article 228, impose penalty payments on member states that refuse to comply with ECJ judgments. In cases where member states have not taken the measures to comply within the assigned time period, the Commission may propose a penalty to be approved by the ECJ in a second decision. The addition of this weapon to the Commission’s enforcement arsenal has been actively used by the institution as a bargaining advantage in negotiations with governments over non-compliance. Since the mid 1990s, the Commission has included the threat of economic sanctions as an ultimate possibility in its communication with member states in association with infringement cases.

The credibility of the Commission’s threats to impose reputational and financial costs is partially contingent on the likelihood that the ECJ will share its interpretation of the alleged infringement cases. As it is, it almost always does. The historical record testifies to a strong tendency on the part of the ECJ to rule in favor of the Commission in cases which go all the way to court decisions. About 90 percent of all judgments in infringement proceedings find in favor of the Commission (e.g., Audretsch, 1986; European Commission 1996). There is no doubt that the ECJ’s judgment record constitutes a significant deterrent, which provides strong incentives for member states to reach a solution at an earlier stage of the infringement procedure.

If we turn to the other party in EU compliance negotiations, member states' bargaining power generally rests with the Commission's overarching desire to ensure the progression of integration, and governments' crucial role in delivering this outcome. Theoretically, national governments could have exploited their position as "masters of the treaty" and threatened to repeal the enforcement authority granted to the Commission and the ECJ, when pressured by the institutions in sensitive cases of non-compliance. But, as Mark Pollack notes, "the threat of treaty revision is essentially the 'nuclear option' – exceedingly effective, but difficult to use – and is therefore a relatively ineffective and noncredible means of member state control" (Pollack 1997: 118-9). Instead, member governments' delegation of enforcement powers to the Commission and the ECJ is best considered an act of self-commitment and intended to secure the credibility of their mutual policy obligations (Garrett 1992; Moravcsik 1998; Tallberg forthcoming). Any tampering with these powers would therefore undermine the purpose of delegation in the first place.

More important in terms of bargaining leverage are member states' capacity to inflict contained damage in specific policy issues, either by prevailing in their non-compliance or by refusing to cooperate in pre-decisional policy formation. Not to forget, member states are unilaterally in control of the decision whether or not to comply, and the Commission is physically unable to exert compliance by way of force. While subjecting themselves to the risk of negative reputational and economic consequences, member governments may nevertheless choose to challenge the Commission with the option of sustained non-compliance. Such challenges speak directly to the Commission's interest in preserving the authority of EC law and to the institution's lack of interest in committing more of its scarce resources to the same case.

Alternatively, member governments may draw bargaining advantages from their capacity to inflict policy-phase retaliation on the Commission. The Commission

requires and desires the continued and constructive cooperation of member states in the decision-making phase, if integration is to progress. While disconnected in theory, the Commission's policy enforcement and policy initiation functions are not as easily separated in practice. The Commission's approach toward a member state in the field of enforcement evidently runs the risk of affecting its relations to this member state in pre-decisional policy formation. As Audretsch (1986: 277) succinctly puts it: "Suing a Member State for (alleged) failure, and trying to obtain its fiat for a political compromise are often hard to combine." The essence of this linkage sanction is therefore the possibility that governments will obstruct Commission initiatives in the pre-decisional phase of EU policy-making in retaliation for infringement proceedings in the post-decisional phase.

Combined, these aspects translate into a dependency of the Commission on state collaboration and a resulting bargaining power on the part of member governments. As opposed to pre-decisional negotiations, where the structural power of the member states is translated into voting strength, post-decisional compliance bargaining mediates existing differences between large and small states. As we will show in the next section, little speaks in favor of a systematic variation in the capacity of national governments to get their way in compliance bargaining with the Commission. Instead, states tend to find themselves equally constrained by the supranational institutions' monopoly on the interpretation of EC law.

#### *Effects: From Pre-Decisional Agreement to Post-Decisional Outcome*

The effects of bargaining constitute the final dimension on which post-decisional compliance negotiations differ markedly from pre-decisional rule negotiations.

Multilateral and carefully calibrated agreements, the result of long and arduous negotiations, are typically assumed to be final. Yet, as a result of compliance bargaining, they may be replaced by bilateral deals that define actual expected behavior, distribute true gains and burdens, and express genuine acts of cooperation. In fact, the very phenomenon of compliance bargaining points to the non-conclusive nature of the agreements that emerge from the negotiations conducted within the EU's legislative processes or at intergovernmental conferences (IGCs).

No EU rules are adopted lightheartedly, without preceding multilateral negotiations between the member states, between the institutions, and with concerned non-state actors. Only the formal part of the most frequently used legislative procedure takes about two years from initiation to final decision. The purpose of these pre-decisional negotiations is to achieve a convergence of views on the particular proposal and to arrive at a decision that is interpreted as legitimate and effective, both by the key negotiating parties and by the concerned societal interests. Typically, the texts eventually adopted constitute compromises, whose every detail has been reviewed a number of times by the national, supranational, and sub-national actors involved in the process. As products of negotiation, these agreements also reflect the relative bargaining power of the parties, and the expectation of a particular distribution of costs and benefits from the implementation of the new rules.

Depending on its outcome, compliance bargaining serves to safeguard or reconstruct the original agreement. Compliance bargaining works to preserve the rules formally adopted when inducing states to follow up on their policy commitments, when upholding a definition of acceptable behavior which accords with the parties' pre-existing understanding, and when confirming the distribution of gains reflected in the original compromise. By contrast, compliance bargaining reconfigures the formal deal when producing less-than-perfect levels of compliance, when redefining the range of

acceptable behavior, and when shifting the original distribution of costs and benefits through separate bilateral deals. In sum, compliance bargaining in the EU may be said to produce the actual outcome, as opposed to the formal agreement.

Whether compliance bargaining safeguards or reconstructs the original agreement can only be determined on a case-by-case basis. In aggregate terms, however, the empirical record demonstrates that bargaining, threats, and persuasion within the framework of the infringement procedure constitute an effective way of solving non-compliance cases. While bargaining, by definition, is a process of give and take, member states tend to do a lot of the giving and not nearly as much of the taking in EU compliance bargaining. The distribution of bargaining power in favor of the Commission produces a strategic context in which states generally find sufficient reasons to agree to settlements, even if these are biased toward the preferences of the Commission. The effects of compliance bargaining on rule conformance are best demonstrated by the sharp decrease in the number of ongoing violations from one step of the infringement procedure to the next. Indeed, existing data show that non-compliance largely is a temporal problem and that few cases can be classified as intractable (Börzel 2000b; Tallberg 2001).

The stages of the infringement and sanctioning procedures function as a political enforcement ladder which progressively increases the pressure and the costs of non-compliance, thereby encouraging governments to find bargaining solutions acceptable to the Commission. At the first, informal, stage, the Commission engages in unofficial contacts with member states once suspected violations have been detected, thereby solving about one third of all cases (Steiner and Woods 1996). A significant share of the remaining cases are settled at the second and third stages of the infringement procedure, where the Commission raises the reputational costs of non-compliance, threatens court referrals, and warns member states of the risk of economic sanctions. Of the total



number of proceedings initiated between 1978 and 1999, only 39 percent reached the stage of reasoned opinions and only 11 percent were referred to the ECJ, as demonstrated by table 1.

**Table 1: Infringement cases per member state by stage, 1978-1999**

State	Formal notice	Reasoned opinion	ECJ referral
Belgium	1,351	618 45.7 %	231 17.1 %
Denmark	725	96 13.2 %	22 3.0 %
Germany	1,260	477 37.9 %	125 9.9 %
Greece	1,496	624 41.7 %	175 11.7 %
France	1,662	678 40.8 %	207 12.5 %
Ireland	1,052	378 35.9 %	104 9.9 %
Italy	1,852	960 51.8 %	372 20.1 %
Luxembourg	1,005	369 36.7 %	114 11.3 %
Netherlands	957	272 28.4 %	60 6.3 %
Portugal	1,110	437 39.4 %	53 4.8 %
Spain	955	317 33.2 %	66 6.9 %
UK	1,055	274 26.0 %	46 4.4 %
EU 12	14,480	5,500 38.8 %	1575 10.9 %

Source: European Commission annual monitoring reports.

If “[t]he initial stages, both formal and informal, between the Commission and the States, are designed to achieve compliance by persuasion” (Steiner and Woods 1996: 413), then this has proven to be a very effective design indeed. Framing these steps of the procedure as a political stage preceding court action, the Commission (1996: 9) emphasizes that it “endeavours to make the fullest use of the pre-litigation stage of the infringement proceedings to persuade the offending Member State to remedy its deficiency or to negotiate a settlement. As the Court has held, referral of an action to it is the last resort, the *ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of the Member States.” Once a case has been referred to the ECJ, the room for political solutions is significantly reduced and bargaining is replaced by the legal process of court proceedings. The cases that are closed before judgments are delivered are generally the result of member states

getting cold feet, rather than amicable settlements. The relatively restricted number of cases where the ECJ indeed delivers opinions contribute to the elucidation of EC law by producing court interpretations that complete the initial contracts.

In the few cases where member governments persist in their violations even after court decisions, the process of compliance bargaining resumes with the initiation of a new proceeding under the Article 228 sanctioning procedure. While structured exactly as the original infringement procedure (letter of formal notice, reasoned opinion, court referral), this procedure provides for economic sanctions as a last resort, if member states are found guilty of non-compliance in a second judgment. In the few protracted cases that remain after the ECJ's first judgment, the sanctioning procedure constitutes an effective tool for finally reaching solutions. In the 18 cases where the Commission so far has initiated proceedings to impose economic sanctions, member states have in all cases backed down (European Commission 1999; 2000). Table 2 provides a summarizing snap-shot of the effects of political and judicial action on state compliance. The table expresses the percentage of the total number of cases closed in 1999 that were solved at each of the stages in the infringement and sanctioning procedures. Of 1,900 cases closed, as many as 95 percent were solved through Commission communication with member governments before referral to the ECJ.

***Table 2: Infringement cases closed in 1999 by stage***

<b>Stage</b>	<b>Number</b>	<b>Percentage</b>
Before formal notice	763	40.2 %
Before reasoned opinion	593	31.2 %
Before ECJ referral	435	22.9 %
Before ECJ judgment	40	2.1 %
Before second formal notice	46	2.4 %
Before second reasoned opinion	12	0.6 %
Before second ECJ referral	10	0.5 %
Before ECJ sanctioning judgment	1	0.1 %
<b>TOTAL</b>	<b>1,900</b>	<b>100.0 %</b>

*Source:* European Commission 2000.

As testified by table 1, all member states display the same preference for backing down or finding amicable solutions at the early stages of the infringement procedure. Yet, member states differ in terms of their bargaining profiles. In particular, states vary as to when in the infringement procedure they tend to settle cases. Some, in particular Denmark, but also the UK, the Netherlands, and Spain, go to great lengths to close cases as early as possible in the procedure. Others, most notably Italy and Belgium, but also Greece and France, tend to persist in their violations and end up having a higher share of cases referred to the ECJ. Germany, Luxembourg, and Ireland signify the average EU bargaining profile.

Package meetings as a form of direct and institutionalized negotiation over compliance are hailed by the Commission as a particularly effective way of settling non-compliance cases: “These meetings ensure that the situation is constantly under review and allow the Commission to bring extra pressure to bear on the competent national departments” (European Commission 1992: 2). The effects of these direct negotiations are reflected in the Commission’s reports. In 1994, 74 of the 217 cases terminated in the area of free movement of goods were settled through package meetings, and in 1995 the corresponding figures were 60 out of 238 (European Commission 1995: 26; 1996: 23).

In sum, compliance bargaining between the Commission and member states, within the framework of the infringement and sanctioning procedures, has demonstrated a notable capacity to induce state conformance with EU rules and “to put an end to infringements...without actions necessarily having to be brought before the Court of Justice” (European Commission 1992: II). Compliance bargaining thereby serves to realize the principled agreements concluded in the Council or at IGCs. The infringement procedure has in that sense become an instrument of policy attainment. As the Commission declared in association with the implementation of the internal market

program: “Article 169 of the EEC Treaty is now an instrument for the achievement of a policy, and not solely an essential legal instrument” (European Commission 1988: 5).

## **Conclusion: EU Compliance Bargaining in a Comparative Perspective**

In this paper, we have followed up on our previous observation that post-agreement bargaining is a common, yet neglected, phenomenon in world politics, by exploring the case of the EU. Much like the general political science literature, the EU-specific literature on negotiation and compliance has largely neglected the processes of bargaining which are central in the post-decisional phase of policy-making. Typically, rule-conforming behavior is not the result of a static decision to comply, but rather the product of dynamic processes of interaction between violators and guardians of the law. Drawing on the general analytical framework outlined in our previous work, this paper has isolated the primary characteristics of compliance bargaining in the EU – the structure of bargaining, the distribution of bargaining power, and the effects of bargaining. More specifically, we have advanced two arguments: (1) that the dynamics of compliance bargaining in the EU are decisively different from those of pre-decisional negotiations, and (2) that the particular institutional structure of the EU provides for a form of compliance bargaining which is effective in addressing violations of EC law.

Let us conclude by placing the patterns of EU compliance bargaining in a comparative perspective. Sensitive to the distinct institutional attributes of the EU, but concerned by the tendency in European studies to treat the EU as unfit for comparison with other polities, we submit that our observations on compliance bargaining carry implications in the wider context of international cooperation. Comparisons with the

WTO and NAFTA suggest that institutional structure is central in shaping patterns of bargaining and, ultimately, compliance.

Rather than maintaining a strict distinction between law and diplomacy, the research on international institutions is increasingly conceptualizing dispute settlement as a continuum, ranging from pure political bargaining to binding supranational adjudication. As noted in a recent contribution, “[t]he real dynamics of dispute resolution typically lie in the interaction between law and politics, rather than in the operation of either law or politics alone” (Keohane, Moravcsik, and Slaughter 2000: 487). Systems for settling disputes and enforcing compliance vary on a number of institutional dimensions, such as access, obligation, “bindingness,” independence, permanence, monitoring, and sanctioning (e.g., Yarbrough and Yarbrough 1997; Alter 2000; Abbott, Keohane, Moravcsik, Slaughter, and Snidal 2000; Keohane, Moravcsik, and Slaughter 2000). In our work, we employ the slightly cruder division between three ideal types of dispute settlement, each with its own pattern of compliance bargaining: self-help bargaining between states in an institution-free environment, third-party bargaining between states before an international arbitration body, and third-party bargaining between an international prosecuting body and states suspected of non-compliance.

In contrast to the EU, the institutional design in the WTO and NAFTA does not provide for prosecutor-based dispute-settlement. Instead, conflicts over compliance are settled through adjudication. In both cases, the key accords institute dispute-settlement mechanisms which offer an aggrieved state the possibility of challenging another state with non-compliance, and have the case decided by an arbitration body. Moreover, the decisions of the arbitration body are essentially binding on the parties, and the complaining state is granted the right to compensation through the suspension of trade benefits, if the decisions are not implemented properly.

The patterns of compliance bargaining which arise in these institutional contexts are fundamentally different from those observed in the EU, in terms of structure as well as power and effects. The format of compliance bargaining is essentially interstate negotiations between the governments involved in a dispute. The dispute-settlement procedures of the WTO and NAFTA function as formal frameworks for these negotiations and the associated exchanges of threats, promises, offers, and counter-offers. The panels appointed to decide disputes and issue interpretations are generally not involved in bargaining *per se*, though they exert certain normative pressure on the parties. Compliance bargaining, however, is not restricted to interaction within the dispute-settlement procedure as such, but often precedes initiation of formal proceedings and follows their termination as well. In the first case, the disputants seek to find an amicable political solution to the informal complaints of the aggrieved party, and thereby avoid costly and divisive litigation. In the second case, bargaining functions as a way of ending mutually disadvantageous exchanges of trade sanctions, in cases where the non-compliant state refuses to implement the panel decision.

Just like in the EU, the structure of interaction shapes the bargaining power of the major actors in the WTO and NAFTA. Unlike the EU, however, where the Commission's prosecutor position mediates the power differential between large and small states, the structure of interstate bargaining in WTO and NAFTA dispute settlement tends to uphold the same differential. Though the move to binding international adjudication in the WTO certainly improves the standing of less powerful states, it does not remove their structural disadvantage in direct compliance negotiations with states whose economies are stronger and more capable of surviving suspensions of trade benefits (Jackson 1998). The absence of a supranational prosecutor further entails that no party in the negotiations enjoys privileged control over the dispute-settlement

procedure and the interpretation of existing rules. In that sense, the process of compliance bargaining is more balanced in the WTO and NAFTA.

Though not easily comparable to EU data, evidence on the initiation and termination of proceedings in the WTO and NAFTA suggests that compliance bargaining constitutes a less effective way of addressing rule violations there than in the EU. This variation in effects can largely be attributed to the interstate structure and the absence of a supranational prosecutor, but also to less powerful measures of last resort. Compliance bargaining is less effective in the WTO and NAFTA partly because states are more reluctant to raise cases and seek amicable solutions themselves. Note Kal Raustiala and Anne-Marie Slaughter: “Because initiation of a dispute is costly, WTO parties may still breach GATT rules and not face punishment” (Raustiala and Slaughter 2000: 46). In addition, the notable symmetry in the WTO between those states that bring cases and those that become the objects of complaints suggests that there is an element of retaliation involved in the initiation of proceedings (Jackson 1998). Between 1992 and early 2000, 192 formal complaints were brought under the WTO dispute-settlement procedure, which is more than the annual average during the last years of the GATT regime, but much less than the approximately 10,000 infringement proceedings initiated in the EU during the same period (Jackson 1998; Neyer 2000). In the case of NAFTA, only a handful of cases have been initiated under the general dispute-settlement mechanism since the entry into force of the treaty in 1994 (Abbott 2000).

Equally important is the seemingly greater capacity of supranational bargaining to end infringements in the EU, compared to interstate bargaining in the WTO. Whereas, in the EU, only about 10 percent of all formal infringement cases cannot be solved through bargaining and therefore result in referrals to the ECJ, about 17 percent of all complaints lodged in the WTO since 1992 have required decisions by the arbitration bodies (Neyer 2000). Moreover, four of these 32 cases involve an open

refusal to comply with the final decision, whereas it yet has not happened in the EU that governments still refuse to comply after full length infringement and sanctioning procedures (Neyer 2000). Where the Commission through threats of sanctions manages to achieve bargaining solutions which are in sufficient conformance with EC law, the suspension of trade benefits in the WTO is a double-edged measure of last resort, which risks producing deadlocks or spirals of retaliation.

In sum, we have identified compliance bargaining as a promising field of study and pointed to the EU as an empirical gold mine deserving further exploration. To deepen our understanding of compliance bargaining in the EU and other international contexts, we need comparative case studies, tracing the to-and-fro and give-and-take of actual bargaining processes.

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